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No. 07-427

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

ERNESTO R. VASQUEZ,
Petitioner,

v.

LOS ANGELES COUNTY ("LA County"), DON KNABE, GLORIA MOLINA, YVONNE B. BURKE, ZEV YAROSLAVSKY, and MICHAEL D. ANTONOVICH, in their official capacities as Supervisors, LA County,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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STATEMENT IN REPLY

Respondents claim that "[t]his case is about whether an individual has the right to dictate by way of litigation what historical or cultural symbols a county can place on its municipal seal." Br. in Opp'n at 1. And they are correct.

As Respondents acknowledge, under this Court's current Establishment Clause jurisprudence, litigants have frequently, and often successfully, "dictate[d] by way of litigation" what symbols can appear on government property, including municipal seals. *See* Br. in Opp'n at 8 (citing cases). The courts have held that such litigants have standing because they are essentially offended by the symbol, thereby permitting them to "dictate" through the courts what symbols are allowed to appear on public property, seals, and insignia. *See, e.g.,* Br. in Opp'n at 8. Consequently, an even-handed application of this Court's Establishment Clause jurisprudence, flawed as it may be, compels a summary reversal in this case.

Indeed, the Ninth Circuit held that Petitioner Vasquez had standing to pursue this litigation, stating, "If we assume for the moment that the revised seal did, in fact, convey an anti-Christian message, then it is understandable that Vasquez would feel aggrieved by that message. He should, accordingly, be able to seek a legal remedy. . . . In short, Vasquez has alleged a sufficiently concrete injury arising out of his direct contact with the purportedly offensive anti-religious symbol at issue in this case." App. 12a-13a. Accordingly, the allegations in the complaint that grant Petitioner Vasquez standing to pursue his

constitutional claim also demonstrate that the Ninth Circuit erred by dismissing his complaint under Federal Rule of Civil Procedure 12(b)(6).[1]

According to this Court, the United States Constitution forbids hostility toward any religion. In fact, in its Establishment Clause cases, this Court has often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or of religion in general. Based on this established principle of law, it is evident that Petitioner Vasquez has stated a claim because the government policy decision at issue singled out a *particular* religious symbols for removal from public places *because it was Christian* in violation of the First Amendment.

In the final analysis, this Court should grant review of this case and summarily reverse the Ninth Circuit based on current jurisprudence *or*, more importantly, grant review and abandon its unworkable tests in favor of a view of the Establishment Clause that produces results consistent with our Nation's religious heritage—a view which underlies the First Amendment itself. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which itself gives

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[1] As Respondents point out, the district court dismissed Petitioner Vasquez's claim for lack of standing. Br. in Opp'n at 3. The Ninth Circuit, apparently concerned with upsetting precedent for future cases challenging religious symbols, reversed the district court on this issue. App. 8a-17a.

'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.").

ARGUMENT IN REPLY

I. Respondents' Policy Decision to Remove the Small Cross *Because It Is a Christian Symbol* Is Subject to Judicial Review.

Respondents seem to suggest that their official policy decision to remove the small cross because it is a Christian symbol should be immune from constitutional challenge because "[o]nce exercised, legislative discretion is . . . not subject to judicial control or supervision." Br. in Opp'n at 4. Respondents are mistaken.

The challenged policy decision here, which singled out a Christian symbol for disfavored treatment, is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that Christian symbols, such as the cross, had to be excluded and banned from such public display. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that a school official's decision to permit a member of the clergy to give an invocation and benediction at the school's graduation ceremony was "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur").

And while the government may have discretion to act in certain areas, it is axiomatic that its actions must comport with the requirements of the

Constitution, including the Establishment Clause. Indeed, there are numerous cases, too many to cite here, in which courts have held discretionary governmental actions unconstitutional, *see, e.g.*, Br. in Opp'n at 8 (citing cases), including cases challenging the government's "discretionary" act to select symbols for its official seal. *See Friedman v. Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (holding unconstitutional a county's seal); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (same).

II. Petitioner's Challenge to Respondents' Policy Decision to Remove the Small Cross *Because It Is a Christian Symbol* Advances a Claim under the Establishment Clause.

The Establishment Clause "forbids hostility toward any" religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Indeed, this Court has long observed, "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993).

Accepting as true all material allegations in the complaint, as required, there can be no dispute that Respondents' official purpose for removing the cross was to disapprove of a particular religion—Christianity. *See* App. 57a-58a. Moreover, this policy decision had the effect of conveying a state-sponsored message of disfavor of the Christian religion. *See* App. 57a-58a. Therefore, Petitioner Vazquez has stated a claim under the Establishment Clause.

Like a polite, public greeting a politician may give to acknowledge the presence of a much hated political adversary, the courts often politely acknowledge the existence of a hostility toward religion claim under the Establishment Clause. However, this acknowledgment is often superficial and meaningless—as demonstrated by this and other cases. *See, e.g., Vernon v. City of Los Angeles,* 27 F.3d 1385, 1396 (9th Cir. 1994) (stating that "[t]he government neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion," but finding no violation); *American Family Ass'n v. City & County of San Francisco,* 277 F.3d 1114, 1124 (9th Cir. 2002) (acknowledging hostility claim, but finding no violation); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (acknowledging hostility claim, but finding no violation).

In the final analysis, there is much confusion in the lower federal courts as to the application of the Establishment Clause, particularly in cases advancing a "hostility" theory. A confusion that only this Court can clarify. *See* App. 23a ("We have noted that because it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a particular religious group, we have little guidance concerning what constitutes a primary effect of inhibiting religion.") (internal quotations and citation omitted). Accordingly, this case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence in the context of reviewing for the first time a case involving hostility toward religion.

CONCLUSION

As this and many other cases have demonstrated, the Establishment Clause jurisprudence of this Court is in need of substantial revision. This Court should grant review of this case and abandon its much maligned jurisprudence in favor of a workable standard that is consistent with our Nation's religious heritage and capable of consistent application.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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